

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Wick Hogs, Inc.)	P & S Docket No. R-95-8
Complainant)	
)	
v.)	
)	
Olsen Frankman Livestock)	
Marketing Service, Inc.)	
)	
)	
Respondents)	Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.) A complaint was filed on March 28, 1994, in which complainant sought reparation against the respondent in the amount of \$6,913.33 in connection with two transactions involving the sale and rejection of livestock in interstate commerce. The livestock were returned to complainant without health papers. Complainant amended the amount of the claim to \$7,517.99 in an affidavit dated June 24, 1994.

Each party was served with a copy of the Department's report of investigation. In addition, the respondent was served with a copy of the formal complaint and filed an answer thereto which denied all allegations. As the amount in dispute did not exceed \$10,000.00, the written hearing procedure provided in Rule 13 of

the Rules of Practice (9 C.F.R. §202.113) was followed.

In accordance with the Rules of Practice, the parties were given an opportunity to submit further evidence. Complainant filed an affidavit and respondent filed no additional evidence. In addition, the parties were given an opportunity to submit briefs. Complainant and respondent each filed briefs.

Findings of Fact

1. Complainant, Wick Hogs, Inc., ("Wick Hogs"), is a corporation whose mailing address is HC 89, Box 5244, Sidney, MT 59270. At all times material herein, the corporation was engaged in the business of buying and selling livestock in interstate commerce as a dealer and market agency buying on commission and was so registered with the Secretary under the Act. Steve Wick was President and manager of Wick Hogs. At all times material here in, Wick Hogs was operating as a market agency buying livestock on commission and as a dealer buying and selling livestock in interstate commerce. Complainant was registered with the Secretary as a market agency and dealer under the Act.

2. Respondent, Olsen Frankman Livestock Marketing Service, Inc. ("Olsen Frankman"), is a corporation whose business mailing address is 803 E. Rice Street, Exchange Building, Sioux Falls, SD, 57103. At all times material here in, respondent was operating as a market agency buying and selling livestock on commission and as a dealer buying and selling livestock in interstate commerce.

Respondent was registered with the Secretary as a market agency and dealer under the Act.

3. Dave Slack is an individual whose business mailing address is 803 E. Rice Str., Exchange Building, Sioux Falls, SD, 57103. At all times material herein, Dave Slack was an agent for Olsen Frankman, conducted business on behalf of his employer as an agent and acted within the scope of his employment.

4. The first transaction involved in this complaint occurred on November 23, 1993. Complainant sold respondent 46 cows through Dave Slack, respondent's agent. The terms were FOB, Sitting Bull Auction, Williston, ND. Respondent sold the cattle to Harlan Ringling, Platte, SD. Ringling agreed to pay the trucking from Williston, ND to his ranch. When the cattle arrived at his ranch, Ringling was dissatisfied with the quality of some of the cows. He contacted respondent's agent, Slack. Slack called complainant and negotiated an agreement for the nine cows to be returned with the required brand inspections and health papers. Slack traveled to Ringling's ranch to inspect the rejected cattle. Ringling had increased the number of cows rejected. Slack called complainant and advised him that more than 9 cows would be returned. Complainant agreed to have a truck he had coming through the Platte, SD area pick up the cows. Slack instructed Ringling to have the cows tested for return to Montana.

5. Complainant hired Dave Claussen Trucking to haul the cows from Platte, SD to Miles City, MT on approximately December 1,

1993. The cows remained at Miles City several days before they were returned to Wick's pens at Sydney, MT. The Montana Department of Livestock, Order of Quarantine showed the cattle were imported with health papers on December 9, 1993.

6. Complainant sold 11 of the 12 returned cows to Tveit & Sons on December 14, 1993 with an understanding that the health papers for the cows would be obtained and forwarded at a later date.

7. After it was determined no health papers could be provided, Tveit returned the cows to complainant. Complainant refunded Tveit the purchase price plus \$188.65 in expenses related to processing the cattle.

8. The Montana Department of Livestock issued a quarantine on the 12 cows on January 4, 1994.

9. Complainant sold a second load of cows to respondent on December 1, 1993. Complainant's invoice dated December 6, 1993 shows 20 cows, labeled December 1st. cut, delivered to respondent's customer, Central Livestock, Minot, SD.

10. Central Livestock rejected the 20 cows as nonconforming. Respondent's agent, Slack, contacted complainant and negotiated an agreement to return the cows with the required health papers at respondent's expense.

11. One cow died at Central Livestock. Nineteen cows were returned. Complainant discovered the cows had been returned without health papers when he sold 14 head to Dale Feldman.

12. The complaint was received in the Grain Inspection, Packers and Stockyards Administration's, Denver Regional office on March 28, 1994. This was ninety days after the date complainant stated respondent's agent notified him that no health papers could be obtained on the cattle on December 28, 1993.

Conclusions

The record shows there are two transactions involved in this dispute. Both transactions resulted in cattle being rejected by respondent's customer and returned to complainant without required health papers. The first transaction date was November 23, 1993 and the second transaction date was December 1, 1993. Complainant has requested damages totaling \$7,517.99 for losses and expenses resulting from the rejection and respondent's return of the cattle without health papers.

Section 309 (a) of the Packers and Stockyards Act and Rule of Practice (9 C.F.R. §202.103 Rule 3(e)) establish a ninety day statute of limitations for filing reparation claims.

Section 309 states, "Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of.

If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper."

Rule of Practice (9 C.F.R. §202.103 Rule 3(e)) states, "Time of filing. The complaint must be received by the Department within 90 days after accrual of the cause of action alleged in it. If a complaint is transmitted or delivered to an office of the Department, it shall be deemed to be received by the Department when it reaches such office. If a complaint is delivered to a full time employee of the Agency, it is deemed to be received by the department when it is received by such employee."

It has been held that the 90 day statute of limitations provided in the Act starts accruing on the transaction date unless misrepresentation or fraud prevented the complainant from discovery of the cause of action. When a misrepresentation or fraud is involved, the ninety day statute of limitations begins to run when the complainant discovers the fraud or misrepresentation or could have discovered it with due diligence or care. Abrendt v. Mobridge. 30 Ag. Dec. 1881, 1888 (1971); Knopp v. Prim, 34 Ag. Dec. 953, 957 (1975). The burden of proof that a fraud or misrepresentation occurred rests upon the complainant.

Both transactions occurred more than ninety days before the complaint was filed on March 28, 1994. The filing date was the ninetieth day after a December 28, 1993 telephone conversation between complainant and respondent's agent, Slack. In his affidavit, complainant stated that during this conversation, Slack confirmed that no papers could be obtained for the cattle.

We agree with complainant's assertion in his brief that complainant agreed to take back the rejected cattle and no damages

or consequences were contemplated against respondent. Complainant did suffer damages due to respondent's failure to insure that the cattle were returned to complainant with the required health and inspection papers. The cause of action in each transaction would be established when complainant discovered the cattle were returned without the required health and inspection papers absent any misrepresentation by respondent that papers could be obtained.

By filing the claim on March 28, 1994, complainant relied on a December 28, 1993 telephone conversation with respondent's agent, Slack, as the cause of action for both transactions. We find that the two transactions were independent events which require separate determination of their causes of action.

In the first transaction dated November 23, 1993, the record is unclear concerning the date the cows were returned to complainant. The cattle were first hauled from Platte, SD to Miles City, MT where they were penned several days before they were moved to Sidney, MT. In his affidavit, complainant stated the cattle were returned on or about December 12th or 13th, 1993. The Order of Quarantine issued by the Montana Department of Livestock lists December 9, 1993 as the date the 12 cows were imported from Platte, SD.

On the reparation complaint form, complainant stated that respondent's agent, Slack, said he had sent papers with the truck. In his sworn statement, complainant stated, "I immediately called Dave Claussen of Dave Claussen Trucking and told him the

situation. Dave Claussen said that he would check it out and find the documentation. At this point in time, I was confident that the trucker would find the documentation and return it to me."

In the first transaction, complainant alleged that respondent's agent, Slack, represented that he had sent papers with the truck. Complainant stated in his affidavit, "On or about December 23, 1993, it was confirmed by Dave Claussen that the only documentation was a handwritten note sent with the truck that said it was permissible to ship the cattle." Sworn statements from Larry Evans, Brand Inspector and Dr. D. M. Douglas, D.V.M. identify December 23, 1993 conversations with complainant concerning the cattle entering Montana without proper health papers.

The fact that the lack of health papers was not discovered until December 23, 1993 is also supported by invoices complainant introduced in the record. The invoice showing complainant sold the returned cows to Tveit & Sons was dated December 14, 1993. Complainant stated in his affidavit, "When it was confirmed that there were no health papers, Tveit & Sons decided not to take the cattle and returned them to me." Complainant's invoice for the settlement with Tveit is dated December 29, 1993. However, complainant introduced a feed bill from Wick Feedlot claiming feed charges beginning on December 23, 1993 for the cows Tveit & Sons decided to return after it was confirmed there were no health papers.

We conclude from the evidence that the cause of action was established in the first transaction by complainant's discovery of the discrepancy on December 23, 1993.

In the second transaction, cattle were shipped to respondent's customer, Central Livestock, Minot, ND. The invoice, dated December 6, 1993, identified the cattle as December 1 cut. One cow died. The remaining nineteen head were rejected and returned to complainant without health papers or brand certificates. On the reparation complaint form, complainant listed December 19, 1993 as the date the cattle were returned to Sidney, MT. Again, there is confusion in the record over when the cows were returned. The invoice for 14 cows sold to Dale Feldman is dated December 23, 1993, but lists "December 12, cat" on the heading. A Wick Feedlot invoice filed to support damages shows feed charges on 14 cows beginning on December 8, 1993 rather than December 19, 1993 as submitted with the complaint form. Complainant has failed to show that he did not learn of the lack of health papers until December 28, 1993 on this load.

Complainant was already aware that respondent had not provided health papers and brand certificates when cattle from the first transaction were returned. Complainant did not exercise due diligence or care by failing to confirm that the cattle returned by respondent arrived with required health papers and brand inspections. Complainant stated he did not discover the papers were missing until brand inspectors made him aware of the problem

on December 23, 1993.

In his affidavit, complainant stated, "I immediately called Slack and told him there was once again a paperwork problem. Slack said that Central was supposed to send the paperwork with the cattle. Slack said he told Central what to do and apparently they had not done it."

Complainant has not satisfied the burden of proof that a fraud or misrepresentation occurred beyond an assumption that respondent would comply with animal health regulations. We find that discovery should have occurred when the cattle were returned to Sidney, MT without required health papers and brand inspection. Complainant did not demonstrate due diligence and care by not checking the papers when the cattle arrived.

Complainant maintains respondent's agent advised him there was no way to obtain health papers during a December 28, 1993 telephone conversation. We disagree with complainant's selection of December 28, 1993 as date of accrual for the cause of action. In the first transaction, we conclude from the evidence that discovery occurred on December 23, 1993. In the second transaction, we find complainant should have discovered the cattle were returned without health papers when the cattle were unloaded. Whether the return date was December 8 or 19, 1993, the March 28, 1994 filing date is beyond the 90 day statute of limitations for both possible transaction dates. Therefore, complainant filed this action after the statute of limitations had run and this matter must be dismissed.

This decision and order is the same as a decision and order

issued by the Secretary of Agriculture, being issued pursuant to the delegated authority, 7 C.F.R. §2.35, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c.-450g.

It is requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250-1400. On a petition to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. §202.117).

On a complainant's right to judicial review of such an order, see 5 U.S.C. §702-3 and United States v. I.C.C., 337 U.S. 426 (1949). On a respondent's right to judicial review of such an order, see Maly Livestock Commission v. Hardin et al, 446 f.2d. 4, 30 Agric. 1063 (8th Cir. 1971); and Fort Scott Sale Co., Inc. v. Hardy, 570 F.Supp. 1144, 42 Agric. 1079 (D Kan. 1983).

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon both parties

Done at Washington, D.C.

JUN 13 1987

WILLIAM G. JENSON

JUDICIAL OFFICER
Office of the Secretary